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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOSE DE JESUS ORTIZ, Petitioner.	2 CA-CR 2011-0259-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20020995

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Ronald Zack, PLC
By Ronald Zack
Tucson
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Jose Ortiz petitions this court for review of the trial court's summary denial of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In 2002, Ortiz and two other men, R. and S., had gone to a house where R. was staying in order to rob A., another resident of the home. R. entered the house first, carrying a gun given to him by Ortiz. R. threatened A. with the gun, but unloaded it and put it down after A. pointed his own gun at R. After A. began beating R. with his gun, Ortiz entered the house, retrieved the gun he had given to R., and shot A., killing him.

¶3 Ortiz was charged with first-degree murder, armed robbery, and conspiracy to commit armed robbery. Ortiz argued he was entitled to a jury instruction based on the crime-prevention justification described in A.R.S. § 13-411 because one of the house's other residents had telephoned him and asked him to come inside to calm R. Section 13-411(A) provides that "[a] person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of" certain enumerated offenses, including aggravated assault. Recognizing the overlap between § 13-411 and Arizona's other justification statutes, however, courts have limited the scope of the version of § 13-411 in effect at the time of Ortiz's crimes to "when a home, its contents, or the residents therein are being protected by the use or threatened use of physical force or deadly physical force against another."[1]

[1]Section 13-411 was amended in 2006 to add subsection (D), which provides that the justification applies to "the use or threatened use of physical force or deadly physical force in a person's home, residence, place of business, land the person owns or leases, conveyance of any kind, or any other place in this state where a person has a right to be." 2006 Ariz. Sess. Laws, ch. 199, § 3; 2011 Ariz. Sess. Laws, ch. 353, § 2.

State v. Thomason, 162 Ariz. 363, 366, 783 P.2d 809, 812 (App. 1989); *see also State v. Barazza*, 209 Ariz. 441, ¶¶ 11-15, 104 P.3d 172, 175-77 (collecting cases).

¶4 In arguing he was entitled to the instruction, Ortiz relied on *State v. Garfield*, 208 Ariz. 275, ¶¶ 14-15, 92 P.3d 905, 909 (App. 2004), in which this court determined a crime-prevention defense instruction was available to a guest purportedly acting at the request of a resident to justify the use of force against another nonresident to protect "the sanctity of [the resident's] home." Thus, Ortiz reasoned, the defense also applies when a guest acts to protect a home's resident from conduct by another resident. The state argued the instruction was unwarranted, relying on *Barazza*, in which this court determined a § 13-411 instruction was not warranted when a nonresident used force against a resident and the nonresident was not acting on behalf of another resident. 209 Ariz. 441, ¶ 16, 104 P.3d at 177. The trial court refused to give the § 13-411 instruction.

¶5 The jury found Ortiz guilty of attempted armed robbery, conspiracy to commit armed robbery, and first-degree, felony murder. The trial court sentenced him to life imprisonment without the possibility of release for twenty-five years for the murder conviction and to lesser, concurrent prison terms for the other offenses. We affirmed his convictions and sentences on appeal. *State v. Ortiz*, No. 2 CA-CR 2009-0260 (memorandum decision filed Jun. 23, 2010).

¶6 Ortiz filed a notice and petition for post-conviction relief, arguing his trial counsel had been ineffective in failing to argue effectively that Ortiz was entitled to an instruction on the crime-prevention defense pursuant to § 13-411. Ortiz argued that trial counsel had "failed to point out the distinguishing factors in *Barazza*, *Garfield* and this

case." Ortiz also asserted his appellate counsel had been ineffective for failing to argue on appeal that the trial court had erred in refusing to give Ortiz's requested instruction. The court summarily denied relief, concluding *Barazza* was controlling and Ortiz was not entitled to the instruction. It further concluded that, in any event, Ortiz had not shown prejudice, because the jury had been instructed on self-defense and defense of a third person and clearly had rejected those theories in finding Ortiz guilty.

¶7 On review, Ortiz again urges that his trial counsel did not effectively argue he was entitled to a crime-prevention instruction and his appellate counsel was ineffective for failing to raise the issue on appeal. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). And, "[f]ailure to satisfy either prong . . . is fatal to an ineffective assistance of counsel claim." *Id.*

¶8 The trial court did not abuse its discretion in rejecting Ortiz's claim of ineffective assistance of trial counsel on the ground Ortiz had not shown prejudice. The court stated it had reviewed the facts of the case in light of Ortiz's arguments in his petition and had determined that they did not "warrant changing the Court's position on the law" and, further, that it had not erred in denying the requested instruction. Thus, Ortiz has not demonstrated the result at trial might have been different had counsel argued differently—the court clearly would have refused to give the instruction regardless of whether counsel had argued as Ortiz suggests he should have. *See id.*

¶9 We also conclude the trial court correctly rejected Ortiz's claim of ineffective assistance of appellate counsel. We agree with the court, albeit for a different reason, that Ortiz has not demonstrated prejudice because, even assuming the court erred in rejecting the instruction, any error was harmless. *See id; State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998) ("Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict."). The jury did not convict Ortiz of premeditated first-degree murder, but instead found him guilty of felony murder based on his participation in the attempted armed robbery of A. *See* A.R.S. § 13-1105(A)(2) (person commits first degree murder if "[a]cting either alone or with one or more other persons the person commits or attempts to commit . . . [armed] robbery . . . and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person"). In finding Ortiz guilty of felony murder, the jury determined beyond a reasonable doubt that Ortiz had shot and killed A. in furtherance of the attempted armed robbery or of immediate flight from the offense. *Id.* That finding necessarily precludes a conclusion that Ortiz had shot A. in an attempt to prevent A. from committing a crime.[2] *Cf. State v. Jones*, 95 Ariz. 4, 8, 385 P.2d 1019, 1021 (1963) ("We follow the general rule that a plea of self-defense is not

[2]We recognize that § 13-411(C), unlike statutes providing for justification based on self-defense and defense of a third person, contains a presumption that a person has acted reasonably "if the person is acting to prevent what the person reasonably believes is the imminent or actual commission of any of the [enumerated] offenses." *See* A.R.S. §§ 13-404, 13-405, 13-406. But that presumption is irrelevant to the jury's conclusion that Ortiz killed A. in furtherance of the attempted robbery, and therefore not in an attempt to prevent A. from committing a crime.

available to one who was at fault in provoking the difficulty that resulted in the homicide. In other words, the accused cannot set up in his own defense a necessity which he brought upon himself.") (citations omitted); *State v. Celaya*, 135 Ariz. 248, 254, 660 P.2d 849, 855 (1983) (self-defense instruction improper in felony murder prosecution based on robbery; "person who is found by the jury to be engaged in an attempted robbery must be considered the initial aggressor; it is immaterial whether the victim of the robbery or the defendant fired first").

¶10 For the reasons stated, although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge